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No. 93-642

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LOIS A. FISHER,

Petitioner,

v.

RUTGERS, THE STATE
UNIVERSITY OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, IN OPPOSITION

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QUESTIONS PRESENTED

1. In the absence of any conflicting decisions of the Courts of Appeals, should this Court review the settled method of summary judgment adjudication in employment discrimination cases, namely, that an employment discrimination plaintiff must produce evidence of pretext in order to survive a defense summary judgment motion?

2. Is there any need for this Court to exercise its supervisory powers where the District Court granted summary judgment to respondent after thoroughly examining the record for evidence of pretext (granting all favorable inferences to plaintiff), where the panel of the Court of Appeals affirmed the grant of summary judgment without opinion, and where the full Court of Appeals denied petitioner's petition for an *en banc* rehearing without dissent?

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ARGUMENT

The District Court Decision And Its Affirmance By The Court of Appeals Do Not Conflict With The Decisions of Any Other Courts of Appeals Or With Any Decisions of This Court. Since The Decisions Below Follow Settled Law, This Case Neither Presents An Important Question of Federal Law Not Yet Decided By This Court Nor Calls For The Exercise of This Court's Supervisory Powers. 19

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BRIEF OF RESPONDENT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

In this employment discrimination case, petitioner contends that the decision by Rutgers University not to appoint her to a second three-year term as an assistant professor was due to discrimination on the basis of age

and sex. By opinion and order of August 5, 1992, the District Court granted respondent's motion for summary judgment on the ground that petitioner had not produced evidence from which a trier of fact could reasonably infer that the University's reasons for not reappointing petitioner were pretext for unlawful discrmination. The Third Circuit Court of Appeals affirmed the District Court without opinion. Petitioner's petition for rehearing *en banc* was denied by the full Court without dissent.

II. FACTS

A. Background

The Faculty of Arts and Sciences – Newark (hereafter, "FASN") is one of several separate academic units located at Rutgers' Newark campus.[1] FASN offers undergraduate business education through a Department of Business Administration. At all relevant times in this case, Norman Samuels was the provost of the Newark campus and David Hosford was the dean of FASN.[2]

A dean has overall responsibility for personnel administration of his or her academic unit. One of the major responsibilities of a dean is continually to seek to improve the quality of the faculty.

At Rutgers, the faculty search and recruitment function is carried out by the faculty in the academic departments who recommend the final candidate to the dean of the academic unit. If the dean is in agreement, the dean will forward his or her recommendation to the provost.

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[1] Rutgers University has three main campuses: New Brunswick, Newark, and Camden, each of which houses various academic units – *i.e.*, schools, faculties and institutes.

[2] The provost is the chief academic and administrative officer of the campus. Each academic unit is headed by a dean or director.

The University's principal objective in faculty hiring is to hire the best faculty at the best (*i.e.*, lowest) price. However, not all disciplines and fields command the same salary. For example, as compared to the humanities (where there has been little if any competition from the private sector), the University frequently must pay a premium to attract high quality faculty in many of the sciences, engineering, and business areas due to competition created by private industry.

B. The Hiring of Petitioner at FASN and Establishment of Her Salary

A salary range of $30,000 to $35,000 for petitioner's position was fixed by Provost Samuels and Dean Hosford before petitioner was known to be a candidate for the position. (Pet. App. 62a) The proposed salary range from $30,000 to $35,000 squared with their respective perceptions of the market for an assistant or associate professor of management in the undergraduate business department at FASN.[3]

The persons involved in petitioner's hiring had reservations about her qualifications for a faculty position in organization management. After reviewing petitioner's resume, in early March 1985, Associate Dean Stanley Kaish questioned whether her doctoral degree (which was in higher education) and her dissertation (which dealt with a study of legislation pertaining to higher education in four states) were suitable background for an assistant professor of organization management.

Following some further communication from petitioner, Associate Dean Kaish ultimately was persuaded

[3] At the time, the market was such that prospective organization management faculty commanded a considerably lower salary than other business fields such as finance or accounting.

that petitioner probably could begin a program of research and scholarship appropriate to the field of organization management and was satisfied that her appointment would meet accreditation standards. Associate Dean Kaish also understood that petitioner was going to attend a "Careers in Business Program" at New York University during the summer of 1985. This summer course was designed to orient persons with non-business doctorates to business subjects.[4] Although Associate Dean Kaish recommended to the FASN Appointments and Promotions ("A & P") Committee[5] that petitioner be appointed as Assistant Professor of Management effective September 1985, the A & P Committee recommended petitioner's appointment "with reservation . . . ."

Dean Hosford considered petitioner's doctoral studies (in the field of higher education) to be marginally related to organization management, was concerned about her limited experience teaching organization management courses, and believed that petitioner's areas of research did not fall within the discipline of organization management in particular or business in general. (Pet. App. 63a) Nevertheless, Hosford thought that, with her social science background (including some work in organizational psychology), petitioner might be able to make the transition into organization management. Helping to tip the scales in favor of hiring petitioner was the fact that Dean Hosford had become aware that petitioner's hus-

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[4]This was not a program of "post-doctoral" studies in petitioner's field, as petitioner suggests. Her field was higher education and the program was designed to orient non-business Ph.D.'s to careers in business.

[5]The A & P Committee consisted of four tenured FASN faculty members. The A & P Committee had certain responsibilities regarding the appointment, reappointment, and promotion of faculty at FASN.

band was a highly regarded faculty member at the University's Graduate School of Management (GSM).[6]

When Dean Hosford recommended the hiring of petitioner, he fixed her salary at $30,033 which was within the pre-established range for her position. His decision to offer a salary of $30,033 was based on his understanding of the market for someone with petitioner's limited credentials in the business field. (Pet. App. 63a)

Provost Samuels had reservations similar to Dean Hosford's about petitioner's qualifications. Although the Provost approved petitioner's hiring, he conveyed his concerns in writing by reminding Dean Hosford of the importance of emphasizing to petitioner the need for publication "in her adopted area" for purposes of continued employment. Provost Samuels approved petitioner's hiring because he was aware that others with doctorates in other fields had successfully made a transition to a business discipline and believed that petitioner might have the potential to do so. (He, too, was aware of petitioner's husband's status at GSM.)

In his April 16, 1985 letter offering petitioner an appointment as an Assistant Professor in the FASN Department of Business Administration for an initial three year probationary term, Dean Hosford "strongly encourage[d] . . . [petitioner] to discuss with Dr. [Jerry] Rosenberg [then Department Chair] plans for developing a full program of research in the field of management." Dean Hosford also informed petitioner that "[b]oth the University Regulations and the AACSB [American Association of Collegiate Schools of Business] standards require a track record of significant scholarship in the field of specialization signified by your appointment."

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[6] GSM houses the University's graduate programs in business.

Petitioner admittedly was well aware of the "culture of the academy" at a research institution – *i.e.*, publish or perish. In addition, both before and after petitioner was hired, Associate Dean Kaish emphasized to her the importance and necessity of embarking on a program of scholarship and research in the management field.

C. Petitioner's Scholarly/Creative Activities and Research Accomplishments.

Despite Dean Hosford's advice in petitioner's appointment letter and despite subsequent direction from the Department Chair, petitioner never really moved ahead with a management-related research program. All of the documentary evidence showed that petitioner foundered in that respect and did not move beyond her dissertation research. The first two and one-half years of petitioner's appointment were marked by ever-changing and conflicting research goals with meager results. (Pet. App. 30a)

As of September 1985 when petitioner began her three year appointment, she had an article entitled "The Role of Politics in the Organization and Development of Public Higher Education in Idaho and Washington" accepted for publication in the *History of Higher Education Annual.* Completed in May or June, 1985, this article was an outgrowth of petitioner's dissertation which involved a comparative study of state legislation affecting higher education from 1900 to 1979 in four states – Idaho, Washington, Tennessee, and New Hampshire.

In her October 1985 progress review, petitioner listed several "goals" with respect to management-related research.[7] Petitioner's 1986 progress and performance

[7] One such "goal" was "[c]heck out other possibilities" to extend her research interests.

reviews reflected that petitioner had done virtually nothing towards accomplishing any of the management-related research goals listed on the October 1985 progress review. In May 1986, the Department Chair gave petitioner the following written instruction as part of her progress review: "As she shifts her emphasis more into Mgt. Studies, *her goals should become more focused in business areas.*" (emphasis added)

As goals for the 1986-87 academic year (as set forth in her 1986 performance review), petitioner emphasized continuation of her attempts to publish and update her dissertation research regarding state legislation and institutions of higher education. As a *secondary* goal, petitioner specified that she would continue her research on professional collective bargaining and would "be alert to other research opportunities in the field of management and begin to explore them if time permits."

During the 1986-87 academic year, petitioner spent the vast majority of her research time in updating and extending her dissertation research with little effort devoted to management-related research such as her work concerning professional collective bargaining.

This pattern of relegating management-related research to secondary status continued with petitioner's 1987 performance review. In that review, petitioner's first goal for the 1987-88 academic year was to revise and extend a paper that was an outgrowth of her dissertation. Petitioner's second goal was to "continue her research on professional collective bargaining aimed at the eventual publication of a paper in this area." Petitioner also listed as goals the "catching up" on exploratory reading and being "alert to other research opportunities in the field of management and . . . explor[ing] if time permits."

The Department Chair's written instructions appended to the 1987 performance review included the following: "As discussed, it is important for her to concentrate her energies in 'bridge-building' so as to generate enthusiasm for her as a solid professor of management." In response to these comments, petitioner affirmed that she ". . . will be aiming at publication in management-oriented journals."

In her application for a sabbatical during the 1987-88 academic year, petitioner stated that most of her leave time "would be applied to . . . the study of professional collective bargaining" and recognized that pursuit of this research was ". . . necessary for the continuation of [her] academic career." Despite these statements, while on leave petitioner switched her focus to the extension of her dissertation research and did virtually nothing in the area of professional collective bargaining or any other management-related research.

D. Reappointment Evaluation Procedures and Criteria.

The first step in the reappointment process is the listing of the candidate's credentials. In addition, the candidate is free to submit any other materials (such as articles, papers, manuscripts) which he or she wishes to have considered. Next, the candidate is reviewed by his or her Department Committee which consists of tenured faculty in the Department at or above the rank for which the faculty member is being evaluated. The department chair ordinarily completes a separate Chair's Summary Statement unless there are three or fewer faculty eligible and present (including the department chair) to make up the Department Committee. In that instance, the department chair participates as a member of the Department Committee and does not complete a separate Chair's Summary Statement.

The next step is evaluation by the A & P Committee of the academic unit. After that, the dean of the academic unit evaluates the candidate and forwards his or her recommendation to the campus provost. On reappointment evaluations not involving tenure, the campus provost has the final authority.

At each level, a written evaluation is prepared and forwarded to the next level of review. The evaluations from the prior levels, together with the candidate's credentials, comprise the candidate's promotion packet. Any supplementary materials submitted by the candidate also accompany the promotion packet through the various levels of review.

With respect to assistant professorships, the University policy states:

> Assistant professorships ordinarily carry three-year terms which are *probationary*. The university has indicated, by appointment or promotion to an assistant professorship, some measure of confidence in the likelihood of a person's continuing growth. The term is limited because the promise may not be fulfilled or because the university may not be in a position to reappoint even a satisfactory assistant professor. It is ordinarily the policy of the university *not to appoint an assistant professor for a second term unless there is reasonable expectation that at the end of that time there will be opportunity for further promotion,* if he or she has qualified. In case of doubt, appointments for one- or two-year terms may be made. [emphasis added] [Pet. App. 91a]

Candidates are evaluated under five criteria: teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general use-

fulness. (Pet. App. 89a) In an evaluation for a second three-year appointment, the evaluators look for at least a satisfactory level of performance under teaching effectiveness. Under scholarly and creative activity and research accomplishments, the evaluators look to see if the candidate is on a trajectory that will likely lead to a record of accomplishment sufficient to support an award of tenure three years hence. Professional activity and general usefulness ordinarily carry little weight in reappointment evaluations not involving tenure.

If a candidate's record is deficient, nonreappointment is the better practice. In this way, the University will be in a position to seek to improve the qualify of its faculty by going out into the market to seek a more promising person.

E. Petitioner's Reappointment Evaluation.

Petitioner's credentials listed only one published refereed article – which appeared in 1985 in the *History of Higher Education Annual* (1985). Petitioner also listed another article as being in press with the *Journal of Higher Education* and scheduled for publication in March or April 1988. Petitioner had no other published articles, articles in press or articles on review with any refereed journals. Perhaps more significantly, *petitioner had no articles published, accepted, or on review with any management journals* as opposed to higher education journals. (Pet. App. 22a) Petitioner even acknowledged, in her statement regarding research appended to her reappointment packet, that:

> Thus far, *my publications have appeared only in higher education journals. I am now concentrating my publication efforts on management journals*

and on professional contacts in the management field . . .[8]

(emphasis added)

As recorded on its written evaluation, the unanimous view of the Department Committee was that petitioner's "record is not likely to lead to tenure. On that basis we believe that reappointment is not warranted."

Under the criterion of teaching effectiveness, the Department Committee noted their puzzlement over what they perceived to be a contradiction between petitioner's expressed view that students were very poorly prepared for her courses and the students' perception (gleaned from student evaluations) that petitioner's courses were relatively easy. (Pet. App. 32a-33a) One Department Committee member had also received a substantial number of negative comments from students regarding petitioner's teaching.[9]

With respect to scholarly/creative activity, the Department Committee noted in their written evaluation that petitioner's one published article and the one in press were based on her doctoral dissertation relating to the history of state laws dealing with higher education and further noted their opinion that the quality of the papers was marginal. The Department Committee pointed out that petitioner had not published in refereed journals in the management field and that the level of output was disappointing in terms of both quantity and quality. The

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[8]Petitioner effectively ignored Dean Hosford's and Professor Rosenberg's advice regarding the need for her to engage in and develop a program of management-related research.

[9]Under teaching effectiveness, two members of the Department Committee rated petitioner as average and one member rated her as below average.

Department Committee also commented that petitioner's current research goals envisioned primarily additional papers based on her doctoral dissertation. Finally, the Department Committee stated their belief "that the probability of simultaneous improvement in both quantity and quality that would be necessary for a favorable tenure decision is remote."

The unanimous view of the A & P Committee was that petitioner's packet did not disclose anything which suggested that the Department Committee's assessment and its ultimate recommendation against reappointment was misguided or otherwise suspect. The A & P Committee saw that petitioner had not made any measurable progress in advancing beyond her dissertation into new areas of scholarship and research and questioned whether petitioner's publications were related to the management field. In the collective view of the A & P Committee, petitioner's deficiencies in scholarly/creative activity and research accomplishments could not support a recommendation in favor of reappointment. The A & P Committee commented: "In no category has the candidate demonstrated satisfactory progress towards the required standards for tenure."

Dean Hosford rated petitioner as average under teaching effectiveness, taking note of the Department Committee's observations and recalling that petitioner had complained to him about the quality of her students. (Pet. App. 102a) This rating was sufficient to meet the threshold of minimally satisfactory performance under that criterion.

Dean Hosford considered the state of petitioner's scholarship and research against the background of his admonition to her in his initial letter offering her an appointment – that she should develop a program of

scholarship and research in the field of organization management. Dean Hosford concluded that there was a marked lack of evidence that petitioner was on track towards establishing a tenurable record of scholarship and research in the organization management field. Although it was and is common for faculty to derive articles from their dissertations, Dean Hosford nevertheless expected that a person in his or her third year, who had already enjoyed a full semester of a one year sabbatical leave, would have demonstrated tangible evidence of growth in scholarship and research beyond the dissertation. In Dean Hosford's view, evidence of this was plainly lacking in petitioner's packet.[10]

Ultimately, Dean Hosford concluded that, given the relative lack of difficulty in recruiting organization management faculty and given his continuing responsibility to improve the quality of the faculty, the obvious decision was to recommend against reappointment of petitioner and to go back into the market for an organization management faculty member.

Provost Samuels viewed petitioner's record under the criteria of scholarly/creative activity and research accomplishments as seriously deficient. He noted that petitioner had had only one article published in a refereed

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[10] Dean Hosford looked to see if plaintiff had substantial work "in the pipeline." However, since petitioner did not submit any of the materials which she listed under "Work in Progress," neither Dean Hosford nor the other evaluators had anything to review in that respect. Moreover, Dean Hosford noted that two of the items listed as Work in Progress were in the most preliminary stages – petitioner described them as "third replication under consideration" and "exploratory work for further study." The titles of the other two items listed under Work in Progress indicated to Dean Hosford that they were further derivations from petitioner's dissertation in the field of higher education.

journal (which was completed and accepted for publication before she was hired in September 1985) and one in press. He also questioned whether petitioner's publications were in the management discipline. Provost Samuels did not see in petitioner's reappointment packet any appreciable scholarship or research beyond her dissertation. In assessing petitioner's work in progress, Provost Samuels noted that petitioner had nothing either submitted to or on review with refereed journals in the field of management.[11]

Provost Samuels viewed petitioner's reappointment candidacy against the need to improve the quality of the faculty in the FASN Business Administration Department faculty. In the Provost's view, given the plain deficiencies in petitioner's record, given the relative lack of difficulty in recruiting organization management people as compared with some of the other business disciplines, and given the fact that petitioner was hired as a "gamble" of sorts since she had neither a degree nor experience in a business field, the better course was not to reappoint petitioner and to try to find somebody with more promise and better qualifications than she.

F. Reappointment Evaluation of Professor Mark Castelino.

Petitioner's primary comparator, Mark Castelino (an Assistant Professor of Finance in the FASN Business Administration Department) began employment at Rut-

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[11] In the Provost's view, the fact that petitioner had had a sabbatical – which is specifically designed to relieve a faculty member from teaching and administrative duties in order to devote full energies to scholarship and research – yet had such a meager record under scholarly and creative activity and research accomplishments underscored the wisdom of the Dean's evaluation and that of the other prior levels of review.

gers at the same time as petitioner and was evaluated for reappointment to a second three year probationary term at the same time as petitioner. The membership of the Department and A & P Committees that evaluated Professor Castelino was identical to those that evaluated petitioner and the exact same procedures were followed for petitioner's and Castelino's evaluations.[12]

Professor Castelino had two refereed articles published as a co-author prior to coming to Rutgers. After coming to Rutgers and up to the time of his reappointment evaluation, Professor Castelino had an additional article published in a refereed journal as a co-author in 1987, had another article in press in a refereed journal as co-author, had three additional articles on review at refereed journals (one of which was co-authored and two of which were sole-authored),[13] and had three other articles in progress. All of Professor Castelino's publications were in the field of his appointment – finance. (Pet. App. 22a) He submitted as part of the supplementary materials accompanying his promotion packet all of his published articles *and his three articles on review.*

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[12] Because the exact same procedures were applied to Castelino's evaluation as to petitioner's, petitioner's claim that her evaluation involved a departure from the University's evaluation procedures is immaterial to her discrimination claim. For example, although petitioner claimed a violation of University Regulations because the Department Chair participated with the Department Committee and did not complete a separate Chair's Summary Statement, the same procedure was followed for Castelino. Whether or not this procedure departed from University Regulations is immaterial since it was equally applied to petitioner and Castelino. (Pet. App. 33a-37a)

[13] One of these articles was on second review, a strong indication that the journal viewed it favorably and had confidence that it would be published.

As to teaching effectiveness, the Department Committee noted that Professor Castelino's student ratings were uniformly favorable.

The Department Committee was persuaded that Professor Castelino was making satisfactory progress towards tenure in the areas of scholarly and creative activity and research accomplishments. The Department Committee saw Professor Castelino's publication record as average to above average in view of the usual time lags in publishing articles in finance journals. The Committee further pointed out that Castelino had three articles currently under review. In addition, the Department Committee noted that Castelino had received two grants totaling over $5,000.00 from the Coordinating Council of Business Studies[14] and that he had devoted a considerable amount of time to the development of a curriculum for a new finance major which the Department Committee viewed as a form of scholarly/creative activity. The Department Committee concluded by saying that "we anticipate that, provided he maintains current productivity levels[,] he will be able to achieve tenure" and voted unanimously in favor of Castelino's reappointment.

With respect to scholarly/creative activity and research accomplishments, the A & P Committee's consensus was that Professor Castelino was making marginally satisfactory progress towards eligibility for tenure. The A & P

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[14] This was a competitive grant program among the several business units at Rutgers – the School of Business at Camden, the School of Business at New Brunswick, GSM, and the Department of Business Administration at FASN – and was a form of positive peer evaluation of Castelino's research. (Pet. App. 31a) Petitioner and Castelino both received smaller University Research Council Grants which were commonly granted to new faculty in all disciplines and which therefore carried lesser weight in reappointment evaluations.

Committee took note of the fact that Castelino had recently published a refereed article, had another refereed article in press, and had three other articles on review with refereed journals. The A & P Committee also saw that Professor Castelino was moving beyond his dissertation. Notwithstanding these positive points, the Committee nevertheless had some reservations. As a result, the A & P Committee recommended a two year, instead of the customary three year, appointment.

Upon reviewing Castelino's packet, Dean Hosford agreed on balance with the A & P Committee's recommendation for a two year reappointment. In Dean Hosford's view, while Professor Castelino had already published several articles and had a reasonable amount of work in the pipeline including three articles (two of which were sole-authored) on review with refereed finance journals, and was moving beyond his dissertation into new areas, he still needed to make a more concentrated effort leading to concrete results in order to have a tenurable record in three years' time. It was Dean Hosford's thinking that the best way to send this message was by means of a two year reappointment. Dean Hosford viewed Castelino's candidacy as one of those "cases of doubt" warranting a two year rather than a three year reappointment.[15]

Provost Samuels took note of Professor Castelino's publication record but, more importantly, saw that Professor Castelino had three additional articles on review with refereed journals in the field of finance. With Castelino's recent articles being sole-authored, his record in scholarly and creative activity and research accomplish-

[15] An additional factor bearing upon Dean Hosford's evaluation of Castelino was the difficulty in recruiting finance faculty.

ments suggested to Provost Samuels that he had an active research program which was producing results. However, the Provost, like Dean Hosford, was persuaded that the two year reappointment was the better course.

SUMMARY OF ARGUMENT

The recent decision of this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. ___ , 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) has not altered the landscape for deciding summary judgment motions in Title VII cases and ADEA employment discrimination cases. If, after a defendant articulates legitimate, non-discriminatory reasons for a challenged employment action, the plaintiff does not produce evidence from which a fact-finder may reasonably infer pretext, summary judgment should be granted to the defendant.

This Court and the lower federal courts have long been mindful of the need to exercise care in reviewing, and to avoid second-guessing, academic judgments in various contexts including faculty employment discrimination cases. *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 198 n.6 (1990) The courts have uniformly held that, to establish pretext in such cases, a plaintiff needs to show more than a mere disagreement about the credentials of faculty members. *E.g., Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir.), *cert. den.*, ___ U.S. ___ , 1991); *Molthan v. Temple University*, 778 F.2d 955, 963 (3d Cir. 1985); *Zahorik v. Cornell University*, 729 F.2d 85, 94 (2d Cir. 1984). Although the District Court and Court of Appeals followed these principles in granting and affirming the University's motion for summary judgment, petitioner is asking this Court to discard these settled precedents even

though no conflict in the circuits exists. This Court should reject petitioner's invitation to depart from settled doctrine and decline to issue a Writ of Certiorari.

ARGUMENT

THE DISTRICT COURT DECISION AND ITS AFFIRMANCE BY THE COURT OF APPEALS DO NOT CONFLICT WITH THE DECISIONS OF ANY OTHER COURTS OF APPEALS OR WITH ANY DECISIONS OF THIS COURT. SINCE THE DECISIONS BELOW FOLLOW SETTLED LAW, THIS CASE NEITHER PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET DECIDED BY THIS COURT NOR CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 24 (1981), this Court established the now-familiar three-step allocation of the burdens of proof and production in employment discrimination cases. First, upon introducing evidence of a *prima facie* case of discrimination, a plaintiff establishes a presumption that discrimination was the motivation for the challenged action. The defendant then has the opportunity to come forward with legitimate, non-discriminatory reasons for the employment decision. This is a burden of production, not persuasion. If the defendant articulates legitimate, non-discriminatory reasons, the presumption of discrimination drops from the case. To prevail, the plaintiff must show that the defendants' reasons were pretext *for unlawful discrimination*. *Hicks, supra*, 509 U.S. at ___ . As a practical matter, plaintiffs often introduce evidence of pretext on their case in chief, anticipating the defendant's reasons. Evidence of pretext also may be offered by way of rebuttal.

Following this Court's decisions in *McDonnell Douglas* and *Burdine*, it has become settled law that summary judgment should be granted to a defendant in an employment discrimination case where the defendant comes forward with legitimate, non-discriminatory reasons and the plaintiff fails to produce evidence from which the trier of fact may reasonably infer that those reasons were pretext for unlawful discrimination. Every circuit in the country has so held. *Villanueva, supra*, 930 F.2d at 127 (1st Cir.) (Title VII); *Zahorik, supra*, 729 F.2d at 93-5 (2d Cir.) (Title VII); *Fowle v. C & C Cola*, 868 F.2d 59, 61-62 (3d Cir. 1989) (ADEA); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 234-35 (4th Cir. 1991) (ADEA); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815-17 (5th Cir. 1993) (ADEA); *Mitchell v. Toledo Hospital*, 964 F.2d 577, 584-85 (6th Cir. 1992) (Title VII and ADEA); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 281-82 (7th Cir. 1985) (Title VII); *Richmond v. Board of Regents of Univ. of Minn.*, 957 F.2d 595, 598 (8th Cir. 1992) (Title VII and ADEA); *Lindahl v. Air France*, 930 F.2d 1434, 1437-38 (9th Cir. 1991) (Title VII and ADEA); *McDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1121-22 (10th Cir. 1991) (ADEA); *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987).

Contrary to petitioner's suggestion, *Hicks* does not require re-examination of Title VII or ADEA jurisprudence applicable to summary judgment motions. In *Hicks*, the question was whether a Title VII plaintiff, who had presented evidence sufficient to establish a *prima facie* case, automatically prevails upon proving that the defendant's asserted reasons were pretext. The Court held that showing pretext was not enough; rather, the plaintiff could not prevail unless the trier of fact also

was persuaded that discrimination motivated the challenged action.

Petitioner seeks to latch onto statements in *Hicks* that the presumption of discrimination created by the establishment of a *prima facie* case drops from the case once a defendant articulates legitimate, non-discriminatory reasons. Petitioner suggests that this means that all employment discrimination cases must be tried so long as the plaintiff has established a *prima facie* case. However, *Hicks* did not break any new ground insofar as it held that the presumption of discrimination drops from the case once a defendant comes forward with non-discriminatory reasons. That has been settled law for some time. *See, United States Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 714-15 (1983); *Burdine, supra*, 450 U.S. at 254-55. With that rule as a backdrop, every circuit has held that summary judgment is appropriate where a plaintiff does not produce evidence of pretext even where the plaintiff has evidence sufficient to establish a *prima facie* case. (See cases cited on p. 20, above.)

Hicks, of course, was decided after a full trial. In *Hicks* no question was presented to this Court or the courts below as to whether summary judgment is appropriate in Title VII cases where a plaintiff has not produced any evidence of pretext. The only issue in *Hicks* was whether proving pretext compels a verdict for plaintiff.

The fallacy in petitioner's argument is that there is not necessarily an equivalency between evidence of a *prima facie* case and evidence of pretext. Evidence sufficient to establish a *prima facie* case may well be inadequate to support an inference of pretext. For example, in faculty employment discrimination cases, a plaintiff can estab-

lish the qualification prong of a *prima facie* case by showing that he or she

> was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, he need show only that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure decision-making body.

Roebuck v. Drexel University, 852 F.2d 715, 726 (3d Cir. 1988). This may be done by showing that one's credentials for promotion (reappointment in this case) were debatable – *i.e.* that there were different views among those involved in the evaluation process. *Bennun v. Rutgers State University*, 941 F.2d 154, 176 (3d Cir. 1991), *cert. den.*, ___ U.S. ___ (1992) (divergent votes of reviewers established debatability of credentials); *Villanueva, supra*, 930 F.2d at 129; *Zahorik, supra*, 729 F.2d at 93-94 (*prima facie* case "made out by showing that some significant portion of the departmental faculty, referrants or other scholars in the particular field hold a favorable view on the question").[16]

The same evidence – difference of opinion about a candidate's accomplishments – is, however, insufficient in and of itself to support an inference of pretext on a defense motion for summary judgment.[17] For a plain-

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[16] In petitioner's case, the evaluators at all levels of evaluation were unanimously against reappointment. The University had argued that petitioner therefore had not produced evidence of qualification for reappointment sufficient to establish a *prima facie* case.

[17] It is easy to come up with other examples where evidence sufficient to make out a *prima facie* case is inadequate to permit

[footnote continued]

tiff to succeed in a faculty employment discrimination case,

> . . . the evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university.

Zahorik, supra, 729 F.2d at 94; *accord, Villanueva, supra*, 930 F.2d at 128, 130-31; *see, Molthan v. Temple University, supra*, 778 F.2d at 963 (to prove pretext, plaintiff must show "more than a denial of promotion as a result of a dispute over qualifications"). (Petitioner has not shown the existence of a conflict among the courts of appeals on this rule either.)

In this case, there was not even any disagreement among the evaluators about petitioner's credentials. At all levels of review, there was unanimity of opinion against reappointing petitioner. Not only were the evaluators unanimous in recommending against reappointment, but also they fully agreed on the reasons for recommending against reappointment: they all felt that petitioner's record of scholarly and creativity activity and research accomplishments was sorely lacking and that

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an inference of pretext. In a hiring or promotion case, a plaintiff may prove that he or she met the minimum qualifications for the position. If the employer comes forward with evidence that the successful candidate had superior qualifications to plaintiff's, summary judgment should be entered for the employer if plaintiff is unable to produce evidence of pretext. Although faculty promotions at Rutgers are not competitive, this is largely what happened here. While the District Court inferred that plaintiff was in that "middle group" as to whom a positive or negative reappointment decision could have been justified and thus was minimally "qualified" for reappointment, it found no basis in the record to infer that the University's higher opinion of Professor Castelino's accomplishments or that its negative views of petitioner were pretext for unlawful discrimination.

it held no promise of petitioner developing a tenurable record in three years time.[18]

As it was obligated to do, the District Court thoroughly combed the record to try to find evidence that could support an inference of pretext. In doing so, the District Court construed the evidence in the light most favorable to petitioner. (Pet. App. 10a) This is standard summary judgment fare and presents no cause for this Court to exercise its supervisory powers, especially since the Court of Appeals panel saw no need to write an opinion affirming the judgment below and since the entire Court of Appeals denied petitioner's petition for rehearing *en banc* without dissent.

While petitioner goes to great lengths in her Petition to point out what she believes are differences in treatment of her and of Professor Castelino, that argument misses the point. For each instance in which petitioner claimed that she was subject to differential treatment, the University produced evidence, by way of affidavits, deposition testimony, or documents, that explained the

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[18]The year before petitioner's reappointment evaluation, Professor Rosenberg and Associate Dean Kaish recommended her for a salary increase and said that she was a "serious prospect for eventually being tenured." However, they were not involved in petitioner's reappointment evaluation and made that statement based on their generalized belief (which turned out to be â mistaken belief) that petitioner had an active program of management-related research in progress. While the District Court viewed this statement as providing some support to petitioner's establishment of a *prima facie* case (Pet. App. at 18a-19a), since neither Rosenberg nor Kaish were involved in petitioner's (or Castelino's) reappointment evaluation, the statement was immaterial to the motivation of the evaluators. *See, Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990) ("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.")

reasons for its actions.[19] After examining the entire record under the appropriate summary judgment standard, the District Court was unable to find any evidence to suggest that the University's reasons were pretext for unlawful discrimination. (Pet. App. 25a to 37a) Since petitioner did not participate in her own or Castelino's evaluations, her self-serving opinions about her scholarship and research and her argument that the evaluators' *opinions* were *mistaken* were insufficient to create a material dispute of fact regarding pretext. The District Court properly focused on the *admissible* evidence in the record to determine if evidence of pretext existed. *See*, Rule 56(e) of Fed. Rules of Civ. Pro.; *Smith v. Flax*, 618 F.2d 1962, 1066-67 (4th Cir. 1980) (plaintiff's perception of himself is not relevant; perception of the decision maker is relevant); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. den.*, 479 U.S. 1066 (1987) (plaintiff "must do more than challenge the judgment of his superiors through his own self-interested assertions"); *Clark v. Whiting*, 607 F.2d 634, 639-40 (4th Cir. 1979) (faculty employment case rejecting "I'm just as good as you are" argument).

Research has not disclosed any post-*Hicks* court of appeals decisions that have rejected the settled doctrine that requires a plaintiff to produce evidence of pretext

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[19] As the District Court found, there was no evidence to support petitioner's assertions that faculty in other departments were reappointed without any publications. While some faculty might not have published any refereed articles at the time of the reappointment evaluation, they had recognized publications such as books, chapters in books, and computer software. These other faculty also had articles *on review* with top journals in their respective fields. Petitioner had no similar accomplishments. (Pet. App. 38a to 40a)

to withstand summary judgment and that instead have embraced petitioner's novel theory that once a plaintiff produces evidence sufficient to establish a *prima facie* case, that evidence necessarily is sufficient to create a factual issue as to pretext. On the contrary, post-*Hicks* decisions have not stepped back from this settled rule. *E.g., Geary v. Visitation of the Blessed Virgin Mary Parish School*, ___ F.3d ___ , 1993 WL 390433, at *8 (3d Cir. 1993) (summary judgment granted); *Card v. Hercules Incorporated*, 5 F.2d 545 (Table) (unpublished), 1993 WL 351337, at *2-*3 (10th Cir. 1993) (summary judgment granted); *Mueller v. Greenlee Textron Inc.*, 2 F.3d 1153 (Table) (unpublished), 1993 WL 312891, at *5 (7th Cir. 1993) (summary judgment granted); *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1417-18 (10th Cir. 1993); *Reiff v. Philadelphia County Court of Common Pleas*, 827 F.Supp. 319, 324-25 (E.D. Pa. 1993) (summary judgment denied); *Dhuria v. Trustees of University of District of Columbia*, 827 F.Supp. 818, 827-28 (D.D.C. 1993) (summary judgment granted); *Robinson v. Overseas Military Sales Corp.*, 827 F.Supp. 915, 921-22 (E.D.N.Y. 1993) (summary judgment granted). Consequently, this case is not an appropriate vehicle for this Court to consider such a fundamental change in the rules applicable to summary judgment adjudication in employment discrimination cases.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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